IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal No.
	)	B204093
Plaintiff and Respondent,	)	
	)	
v.	)	Superior Court No.
	)	BA316997
MAURICE LEWIS,	)	
	)	
Defendant and Appellant.	)	
	)	

FROM THE JUDGMENT OF THE SUPERIOR COURT
FOR THE COUNTY OF LOS ANGELES, THE HONORABLE NORM SHAPIRO,
JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This is an appeal from a final judgment following a jury trial and is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

Appellant was charged by information with a six offenses arising out of a single incident on January 22, 2007 involving Lloyd Collins. (1 C.T. 100-103.) It was also alleged with respect to all counts that appellant suffered a prior serious felony pursuant to Penal Code section 1170. 12, subdivision (a) through (d) and 667, division (b) through (i). (1 C.T. 105.)

On May 16, 2007, retained counsel for the preliminary hearing was relieved

and the public defender was appointed to represent appellant (1 C.T. 79, 80.) Appellant entered a plea of not guilty and denied all special allegations. (1 C.T. 80.) On June 14, appellant appeared with private counsel and the public defender's office was relieved. (1 C.T. 81.) On June 25, 2007, appellant's motion to continue was granted and the jury trial set for July 12, 2007. (1 C.T. 84.) On July 18, 2007, counsel announced ready for trial and the matter was sent to Department 100 for jury trial. (1 C. T. 87.) The matter was trailed until July 20, 2007, at which time the parties conferred regarding a possible disposition and witness scheduling. (1 C.T. 89.) The matter was then trailed until July 23, 2007. (1 C.T. 92.) On July 23, after jury selection commenced appellant requested new counsel, a *Marsden* hearing was held and his request was denied. (1 C. T. 96.) Appellant's motion to bifurcate the trial on his priors was granted. (1 C. T. 94.) On July 24, 2007, the court and counsel conferred with bar panel counsel regarding a potential witnesses testimony. (1 C.T. 98.) Appellant's motion pursuant Penal Code section 1118.1 was denied. (1 C.T. 110.)

The jury found appellant guilty on Counts I through VI as follows: Count I, assaulting Collins with a firearm in violation of Penal Code section 245, subdivision (a), subsection (2). Count II, threatening Collins in violation of Penal Code section 422. (1 C.T. 172.) Count III, brandishing a firearm at a person in a motor vehicle in violation of Penal Code section 427.3. (1 C.T. 172.) It was also

found true that in the commission of Counts I through III that appellant personally used a firearm within the meaning of Penal Code section 12022.5. (1 C.T. 172.) In Counts IV and V respectively, appellant was found guilty of being a prior felon in possession of a a firearm in violation of Penal Code section 12021, subdivision (a), subsection (1) and 12021, subdivision (c), subsection (1) and in Count VI of possessing ammunition in violation of Penal Code section 12316, subdivision (b), subsection (1). (1 C.T. 172.)[1]

At a bifurcated proceeding, appellant admitted that the suffered a serious felony prior. (3 R. T. 665.) On August 16, 2007, appellant's motion to substitute counsel was granted and the court ordered a transcript of the trial prepared. (1 C.T. 188.) Appellant's Motion for New Trial was heard and denied on October 15, 2007. (1 C.T. 191.)[2] Appellant's motion to strike his prior for purposes of sentencing pursuant to *People v. Superior Court (Romero)* (1996) 23 Cal. 4th 497, 530 was heard and denied. (1 C.T. 193-198, 202.)

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1 There were originally ten counts alleged. Count VI as it appeared in the information was re-numbered for the purpose of the verdict as Count V and Count VIII was deemed Count VI, Count IX was deemed Count VII and Count X, Count VIII. Counts VII and VIII were severed. (2 R. T. 201, 225, 231.)

2 A Motion to Augment the Record to Include a complete Copy of the Motion for New Trial is being filed simultaneously with Appellant's Opening Brief. The Motion with will be referred to as (2 SUPPLEMENTAL CLERK'S TRANSCRIPTS [2 S.C.T.])

Appellant was sentenced to a total of 19 years, 8 months in state prison as follows:

On Count I appellant was sentenced to 8 years [the upper term doubled] plus 5 years for the serious felony prior pursuant to Penal Code section 667 subdivision (A), subsection (1) , plus the midterm of four years for the firearm allegation pursuant to Penal Code section 12022.5, subdivision (a). (3 R.T. 681.) On Count II the court imposed a 2 year midterm sentence to run concurrent to the sentence on Count I. (3 R.T. 681.) On Count III the court imposed 16 months [1/3 the midterm doubled] to run consecutive to Counts I and II. (3 R.T. 681-682.) On Count IV the court imposed 16 months [1/3 the midterm doubled] for a total sentence of 19 years 8 months. (3 R.T. 682-683.) The sentence on Count V was stayed pursuant to Penal Code section 654. (3 R.T. 682-683.) On Count VI the court imposed the midterm sentence to run concurrent to sentences on the other counts. (3 R.T. 683, 692.)

Appellant filed a timely notice of appeal. (1 C.T. 208.)

STATEMENT OF FACTS

Prosecution:

On or about January 20, 2007, Pirate Recovery, an auto repossession company, received a fax from Lobel Finance requesting recovery of appellant's Monte Carlo. (2 R.T. 266-267.) Before leaving to recover the vehicle, supervisor Lloyd Collins checked the vehicle identification number (VIN) in Pirate's computer system and found that he and another employee, Angela Daywalt, personally repossessed the same vehicle from the same location in September 2005. (2 R.T. 272.)

On January 22, 2007, Collins and Daywalt, went to appellant's residence on 5514 South Budlong to repossess the vehicle for the second time. (2 R.T. 262, 264, 275-276, 293.) When they arrived the Monte Carlo was parked in the alley parallel to appellant's residence, as it was in 2005. (2 R.T. 276, 357.) Collins hooked the front of vehicle to the tow truck, which set off the car's alarm, while Daywalt backed up the tow truck. (2 R.T. 276-277, 361.) Seeing what was transpiring and hearing the alarm, a female, later identified as Forever Merritt,[3] exited the residence in her underwear and yelled/screamed that they were not going to take the car. (2 R.T. 361, 3 R.T. 531.) Shortly thereafter, appellant came to the

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[3] Appellant and Merritt have been together since 2000 and have two children aged 6 years old and 21 months old. (3 R.T. 536.) They have an off and on relationship, but she loves him because he is the father of her children. (3 R.T. 537.)

doorway holding a gun to his right side at waist level. (2 R.T. 362.) Appellant pointed the gun directly at Daywalt, who was an unobstructed 7-8 feet away with her window partially down, then yelled at her, "*You are not going to fucking take my car.*" (2 R.T. 363, 367-368.) According to Merritt, Collins told her to "*Shut up. Go back in the house. Mind your own business.*" (3 R.T. 534.)

Daywalt radioed to Collins that appellant had a gun. (2 R.T. 364.) Collins instructed Daywalt to pull forward and turn right on to Budlong Street because he was concerned for her safety. (2 R.T. 278-279, 364.) At first Collins could not see the front door of the house from his location. (2 R.T. 279-280.) However, after Daywalt pulled the Monte Carlo onto the street, Collins saw appellant standing 7-10 feet away on the porch pointing a rifle at him. (2 R.T. 281, 283, 365.) Collins said that appellant's conduct, at that point, was not unusual to him because it is common in his line of work to have guns pointed at him. (2 R.T. 281.)

According to Collins, appellant said loudly, "*You are not going to take [my] fucking car again,*" and that Collins, "*might as well drop that shit now before he caps him off.*" (2 R.T. 282.) Collins told appellant that they had been through this before and to "*just put the gun up.*" (2 R.T. 282.) Appellant responded, "*Fuck you. Put my shit down before I fucking cap you off.*" (2 R.T. 282.) Appellant told Collins he "*didn't give a fuck, you can't take my shit. Now drop it.*" (2 R.T. 286.) At first Collins was not afraid, however, he became fearful when appellant did not

change his position, did not lower the weapon and remained adamant about Collins leaving the car or being shot. (2 R.T. 283, 288-289.)

Believing he could be shot, Collins backed away from appellant onto Budlong, then radioed Daywalt to meet him around the next corner. (2 R.T. 290.) Daywalt called 911 when she first turned onto 55th Street. (2 R.T. 380.) As Collins approached he saw a blue Nissan Altima, drive past him very quickly and head toward the tow truck. (2 R.T. 296-297, 372.) The Altima was driven by Merritt[4] alone, who stopped behind the tow truck, got out and tried to get inside of the Monte Carlo. (2 R.T. 297, 373.) Daywalt blocked the Altima from passing to prevent Merritt from blocking her. (2 R.T. 298.) Merritt turned around and drove back past Collins and toward Budlong. (2 R.T. 298-300.)

The Altima quickly returned this time driven by appellant. (2 R.T. 300.) Appellant unsuccessfully tried to drive around the tow truck then stopped the car, got out and ran towards the Monte Carlo, as Merritt got into the driver's seat of the Altima. (2 R.T. 300-301, 375.) Appellant spotted Collins and walked quickly toward him with his hands in his pockets. (2 R.T. 301.) Appellant started to run toward Collins then pulled out a handgun[5] and pointed it at him. (2 R.T. 301.)

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4 Merritt had a 2002 Chevy Malibu and has never owned an Altima and did not know anyone in the neighborhood who drove a blue Altima. (3 R.T. 532-533.)

5 Collins did not tell police the type of handgun because he was never close enough to distinguish the caliber or get a description. (2 R.T. 342-343.)

Collins tried to run, hit the trunk of a palm tree, then spun around and ran down the sidewalk. (2 R.T. 301-302, 304.) Collins sustained a scratch on his hand and forehead from hitting the tree. (2 R.T. 302.) According to Collins, appellant stopped chasing him and returned to driving[4] the Altima with Merritt in the passenger seat. (2 R.T. 305.) Collins returned to the tow truck. (2 R.T. 305.)

Daywalt, who was still on the line with the police, reported her location as she turned right from 55th Street onto southbound Vermont. (2 R.T. 380.) Daywalt drove zigzag and on the wrong side of the road because appellant had a gun and she was afraid for her life. (2 R.T. 382.) The Altima almost hit a bus and went up a curb. (2 R.T. 382.) Near Vermont and 75th Street, the Altima overtook the tow truck, so Daywalt turned around, stopped and waited for police, who she saw behind her. (2 R.T. 308, 314, 384, 386.) The Altima stopped ahead of the tow truck then turned right and left the scene. (2 R.T. 309, 386.)

Approximately 30-45 minutes after police arrived, officers drove Collins back to appellant's residence where he identified appellant and Merritt. (2 R.T. 330-331.) Daywalt remained at the location and waited for Collins to return. (2 R.T. 388.)

Daywalt did not see a handgun at any time. (2 R.T. 379.)

[4] According to Daywalt, Merritt drove the Altima and another person who she could not see but believed was appellant was in the passenger seat. (2 R.T. 384.)

Search No. 1

Merritt consented to a search of the Budlong residence. (2 R.T. 413.) After appellant was taken into custody, Officers Marco Sobrino, his partner, and two other officers searched appellant's residence for firearms and additional persons related to the incident. (2 R.T. 406-407, 415.) Officers checked every room and did not find any weapons or ammunition. (2 R.T. 410, 413.) Sobrino saw a blue Altima at the scene, but did not search the vehicle. (2 R.T. 419.)

Officer Sobrino was not told whether to look for a large or small firearm, so his search focused on both sizes. (2 R.T. 416.) Sobrino felt he conducted a thorough search under the circumstances. (2 R.T. 413.) He walked the location and checked under the beds, but did not open containers or look underneath clothing. (2 R.T. 413-414.) However, Sobrino later testified that the search was not thorough because the residence was very cluttered and, as a consent search, Merritt's could withdraw her consent at anytime. (2 R.T. 417.) In fact, Merritt did not withdraw her consent and Sobrino admitted that he could have continued searching as long as he liked. (2 R.T. 417-418.)

Search No. 2

On February 6, 2007, Detective Bradley Mossie was assigned to the case. (3 R.T. 475.) After speaking to Collins and Daywalt, Mossie prepared a search warrant for appellant's home, which he served on February. 9, 2007 with Detective

Logan and 7-8 other officers. (2 R.T. 425-426.) Appellant was in custody and no one was the residence when the search warrant was served. (2 R.T. 431.)

A green case containing an unloaded Remington 870 shotgun was found in the master bedroom closet. (2 R.T. 431, 439, 460.) Detective Logan found a white plastic bag containing a box with 19 shotgun shells inside on the top shelf in the closet, under some clothing. (2 R.T. 433, 3 R.T. 490.) Logan found the shotgun directly below the same shelf, between some clothing leaning against the wall. (2 R.T. 433, 3 R.T. 491.) The ammunition recovered was compatible with the recovered shotgun. (2 R.T. 439.)

In addition, Detective Mossie found various documents addressed to appellant in the living room of the apartment. (2 R.T. 443, 465.) The documents included utility bills, a notice from Lobel Finance regarding the Monte Carlo, a collection letter, and an auto insurance notice from Bristol West. (2 R.T. 447-450.)

Identification of the shotgun

The recovered weapon was later identified by Collins and Daywalt. Collins is a gun collector so he recognizes guns by the length and shape of the barrel. (2 R.T. 333.) Collins reported to police on the day of the incident that the weapon was a rifle because of its long thin barrel. (2 R.T. 284.) After a shotgun was recovered from appellant's residence, Collins met Detective Mossie at the police

station, and said it was the same weapon appellant had pointed at him. (2 R.T. 331- 332.)

Daywalt does not know anything about guns. (2 R.T. 378.) She initially reported that the gun had "a long barrel," a little bit longer than a foot. (2 R.T. 379.) About two weeks later, Daywalt also met Detective Mossie at the police station to identify the recovered shotgun. (2. R.T. 392.) Daywalt said she recognized the tip of the gun and that it was the same weapon that was pointed at her on the day of the incident. (2 R.T. 392.)

Defense:

Forever Merritt has lived at 5514 South Budlong since 2002. (3 R.T. 509.) On February 4, 2007 Merritt's sister-in-law, Monique Lewis, brought the recovered shotgun to Merritt's house on for safekeeping. (3 R.T. 512-513, 525-526.) Lewis is appellant's sister and Merritt has known her since 2002. (3 R.T. 523.) Merritt agreed to keep the gun a few days until Lewis found someplace else to keep it. (3 R.T. 527.)

Merritt checked the weapon and believed it was never loaded. (3 R.T. 513, 529-530.) Merritt does not know how to check a weapon to see if it was loaded but looked into the chamber and felt confident it was unloaded. (3 R.T. 529-530.) The shotgun was kept in the case and shells for the shotgun were kept in a box in a black plastic bag on the top shelf in the bedroom closet. (3 R.T. 511-512, 524.)

Merritt and appellant have two small children together. (3 R.T. 515.) According to Merritt, appellant had lived with his grandparents since 2002 and only came Merritt's residence to visit or babysit their children. (3 R.T. 515, 521.) Appellant also received mail at Merritt's residence, which she kept for him on the mantlepiece in the livingroom. (3 R.T. 517.) The phone and utilities at Budlong were in appellant's name, so she opened those items in order to pay them, but did not open his other mail. (3 R.T. 521.)

In 2004 Merritt charged appellant with domestic violence. (3 R.T. 515.) Appellant was convicted in the domestic violence case and a restraining order was issued. (3 R.T. 538-539.) Merritt had the restraining order removed so she and appellant could spend time together with their two children and his four other children who regularly visit Merritt. (3 R.T. 542.)

ARGUMENT I

APPELLANT SHOULD HAVE BEEN PERMITTED TO TO RELIEVE RETAINED COUNSEL

A. Introduction

On May 16, 2007, private counsel was relieved and the public defender was appointed to represent appellant (1 C.T. 79, 80.) Appellant entered a plea of not guilty and denied all special allegations. (1 C.T. 80.) On June 14, appellant appeared with private counsel and the public defender's office was relieved. (1 C.T. 81.) On June 25, 2007, appellant's motion to continue was granted and the jury trial set for July 12, 2007. (1 C.T. 84.) On July 18, 2007 counsel announced ready for trial and the matter was sent to Department 100 for jury trial. (1 C. T. 87.) The matter was trailed until July 20, 2007, at which time the parties conferred regarding a possible disposition and witness scheduling. (1 C.T. 89.) The matter was then trailed until July 23, 2007. (1 C.T. 92.) Jury selection started at 2:15 the afternoon of July 23, 2007, and resumed the next morning at 11:20, July 24, 2007. (1 R.T. 14, 87.) Immediately on July 24, appellant asked to address the court, saying he wanted to *Marsden* his private counsel. (1 R.T. 87.) The court denied the motion saying it was too late in the proceedings to make any changes. (1 R.T. 91.) Appellant said that his attorney was lying to him and had not done anything on the case since being retained. (1 R.T. 93.) The court then conducted a

Marsden hearing, which was denied, and the trial continued with appellant's private counsel. (1 R.T. 94-A.)

1. The *Marsden* Hearing

With the prosecutor out of the courtroom, the court asked only to hear from trial counsel. Counsel stated he was hired on the case a day before the pretrial and when he came to court there was no file. It "took a couple of days" to check with appellant's previous lawyer, only to find out the Public Defender still had the file. (1 R.T. 94.) Counsel was further "delayed about a week in getting the file." (1 R.T. 95.)[3] He provided appellant with redacted police reports and copies of the preliminary hearing transcript. He then did an "analysis of the sentencing options," and gave appellant his best assessment of the case. Counsel stated that appellant was frustrated that he did not make any pretrial motions. (1 R.T. 95-96.) No mention was made of efforts to contact or interview witnesses. (1 R.T. 94-97.)

The court concluded finding the, "Record fails to demonstrate that continued representation by [Counsel] would deprive the defendant of representation, and the *Marsden* Motion is denied." (1 R.T. 96-97.) Appellant repeated that he did not want his retained counsel on his case. (1 R.T. 97.)

B. The Applicable Law

The Sixth and Fourteenth Amendments of the United States Constitution

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[3]1 R.T. 94-97 are referenced from a Sealed *Marsden* Hearing.

guarantee a criminal defendant the assistance of counsel at all critical stages of the proceeding. (*Gideon* v. *Wainright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 796, 9 L.Ed.2d 799].) That right is "recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." (*U.S.* v. *Cronic* (1970) 466 U.S. 648, 658 [80 L.Ed 2d 657, 104 S.Ct. 2039].) The right of a criminal defendant to counsel and to present a defense are among the most sacred and sensitive of our constitutional rights. (*People v. Lara* (2001) 86 Cal.App.4th 139, 149.)

Pursuant *Marsden*, "When a criminal defendant seeks substitution of counsel on the ground that appointed counsel is providing inadequate representation, a trial court must give the defendant an opportunity to explain the reasons for the request." (*People v. Marsden* (1970) 2 Cal.3d 118, *People v. Mendoza* (2000) 24 Cal.4th 130, 156-157.) "If defendant articulates facts which suggest that counsel is rendering constitutionally ineffective assistance, the trial court has a duty to make whatever inquiry is necessary to develop a record sufficient to assess the claim [citation]." (*People v. Crandell* (1988) 46 Cal.3d 833, 893-894.)

Marsden hearings, however, are held when a defendant has court appointed counsel, not a privately retained attorney. An accused has an unqualified right in all cases to be represented by counsel personally chosen by the accused. "If in any

case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (*Powell v. Alabama* (1932) 287 U.S. 45, 53 [53 S.Ct. 55, 65, 77 L.Ed. 158, 170].) A criminal defendants interest in discharging a retained attorney is included within the right to counsel of one's choice. (*People v. Lara, supra*, 86 Cal.App.4th at 152.)

Accordingly, in contrast to situations involving appointed counsel, a defendant may discharge his retained counsel of choice at any time with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) The right to a continuance for the purpose of discharging retained counsel on a proper showing is a corollary to the fundamental right of representation, and the arbitrary refusal of a continuance may constitute a denial of due process. (*Chandler v. Fretag* (1954) 348 U.S. 3, 75 [75 S.Ct. 1, 5, 99 L.Ed. 4, 10]; *People v. Lara, supra*, 86 Cal.App.4th at 153.)

Just because a motion to discharge retained counsel is made on the eve of trial it is not necessarily untimely. (*People v. Lara, supra,* Cal.App.4th at 162-163.) A court may deny a request made at the time of trial, if a defendant has been "unjustifiably dilatory or . . . arbitrarily desires to substitute counsel at the time of trial." (*Id.* at 153 citing, *People v. Blake* (1980) 105 Cal.App.3d 619, 623-624; *People v. Ortiz, supra*, 51 Cal.3d at 983-984.) The fair opportunity to secure

counsel of choice provided by the Sixth Amendment is limited by the countervailing state interests "against which the Sixth Amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers and jurors at the same place at the same time.'" (*Id.*) "A court faced with a request to substitute retained counsel must balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*People v. Lara, supra*, 86 Cal.App.4th at 153.)

Reversal is automatic when a defendant has been deprived of his right to discharge retained counsel and defend with counsel of his choice. (*People v. Ortiz, supra*, 51 Cal. 3d at p. 988.) "The right to counsel of choice is one of the constitutional rights most basic to a fair trial. Accordingly, it is clear that a criminal defendant need not demonstrate prejudice resulting from a violation of that right in order to have his conviction reversed." (*Ibid.*) The improper denial of a defendant's right to discharge retained counsel was akin to violation of other " 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . .'" (*Ibid.*, quoting *Chapman v. California* (1967) 386 U.S. 18, 23 [87 S. Ct. 824, 827-828, 17 L. Ed. 2d 705].)

C. Appellant's Request Was Timely, In Good Faith and Would not Have Caused Undue Delay or Prejudice to the Prosecution

Here, the court did not engage in any balancing of judicial interests against

the rights of the defendant to be represented by counsel of choice. Had the court done so, it would have found that appellant's request was timely under the circumstances, was made in good faith, and that granting his request would have caused minimal disruption. More importantly, it was vital for the protection of appellant's right to a fair trial.

In *People v. Lara*, *supra* the court found that a request to discharge retained counsel made on the first day trial was set to begin was not untimely. In making this determination, the court found that there was no evidence that the defendant raised the complaints to delay the proceedings, the defendant raised his concern at the first possibly opportunity, the proceeding had already been delayed a year and a half, the trial court had repeatedly granted continuances on the motions of both prosecutor and defense, and there was no evidence that the witnesses would be inconvenienced by any delay. (*Id.*)

In the instant case, appellant, like the defendant in *Lara*, made his request at the early in the proceedings, only hours into jury selection. Right before the jury selection process started on July 23, the judge went over a lengthy review with the appellant of his sentencing options and the government's offer on the table. (1 R.T. 1 - 14.) It was not until moments before the jury came in that appellant made his final choice to go to trial. (1 R.T. 13.) As the court was asking if the jury was ready outside, the defendant was still asking the total number of years in the

government's offer. (1 R.T. 11.) Obviously, appellant made his final decision to go to trial within moments of the jury appearance and he was then forced to start assessing his attorney's readiness for trial.

Before jury deliberations could resume on the second day, appellant made his intentions known as soon as possible. Based on his statements, appellant was concerned his counsel was unprepared and realizing the reality that his case was going to trial, appellant requested to relieve his attorney. No pretrial motions had yet been decided. (1 R.T. 87-94.)

Furthermore, like the defendant in *Lara*, the record reveals that appellant did not make his request in an attempt to improperly delay the proceedings. Rather, the record shows that appellant made the request due to his genuine concern that counsel was not ready and able to defend him. Appellant had been told the day prior that if convicted, he was looking at a prison term of, "sixteen or seventeen years, and maybe more." (1 R.T. 8.) The trial court heard for himself at the *Marsden* hearing that counsel did not volunteer having spoken to any witnesses other than the girlfriend (Forever Merritt) or doing any investigation. Counsel appeared for appellant for the first time June 14, 2007, the day after he was retained. (1 C.T. 81, R.T. 94.) Counsel admitted he did not get the file for several days because he did not know the file was with the Public Defender and then we was "delayed" an additional week in getting the file for an unexplained reason.

(R.T. 94-95.) Thus, having had the file for approximately one month, Counsel surely had enough time to do investigation and witness interviews, and appellant was rightly concerned that his case was not ready for trial. (See Argument II, Ineffective Assistance of Counsel Claim)

Appellant's request was thus timely and made in good faith. Notably, the prosecution did not even object to appellant's request on the ground that it was untimely. In fact, the prosecution was never consulted.

There is no evidence to support a finding that the delay would have prejudiced the prosecution. Appellant was in custody and posed no danger to the community. The witnesses were all from the local area and therefore, it is unlikely that any of the witnesses would be inconvenienced by a delay. Thus, there is nothing in the record to support a determination that granting appellant's request would have disrupted the orderly administration of justice.

Although it was not the focus of the *Marsden* hearing, the court did mention in response to appellant's initial request to fire his lawyer, the court did say, "He's your lawyer at this point and we are into the proceedings, and it's to late to make any changes at this point...Let me explain to you, if that was the case you could hire lawyer after lawyer pm the eve of trial or just the beginning of trial, fire your lawyer, and then we'd never get the case tried." (1 R.T. 91.) The trial court appeared to be expressing the concerns about disruption of the court's calendar by

granting appellant's counsel of choice request. However, his statements are not specific to appellant's circumstances and do not demonstrate a particularized weighing of the history of appellant's counsel of choice concerns. Appellant did not have a history on this case of firing attorneys on the eve of trial. In spite of the fact that the court is aware of judicial economy issues, his statements do not suffice for a valid consideration of e appellant's Sixth Amendment right to counsel of choice.

D. The Court's Exercise of Discretion Is Not Entitled To Deference Since it Employed the Wrong Standard

The court erred in conducting a *Marsden* hearing since appellant had an unequivocal right to fire his retained counsel. The court never did a particularized balancing of the appellant's situation and jumped right to a *Marsden* hearing which was inappropriate for a defendant with retained counsel. At appellant's *Marsden* hearing, the trial court did not ask appellant to make any statements. Presumably the court was relying up on the statements made by appellant immediately prior to the hearing that his attorney was lying to him and had not done anything on the case since being retained. (1 R.T. 93.)

In spite of what was stated by the trial court, to fire his retained counsel appellant was not required to show that "the continued representation by [Counsel] would deprive the defendant of representation," as was the ruling of the trial court. (R.T. 96-97.) Rather, appellant only had to assert that he wanted to discharge his

retained attorney. "[W]hen fundamental rights are affected by exercise of discretion by the trial court, . . . such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." *(People v. Lara, supra* at 165.)

Since appellant's counsel was privately retained, a *Marsden* motion was inappropriate and the trial court was obliged to rely on different factors in exercising its discretion to relieve retained counsel. Given the trial court's misunderstanding of the nature of appellant's request and the law applicable to that request, it cannot be said that the trial court properly exercised its discretion in refusing to permit appellant to discharge his retained counsel.

E. Reversal of Appellant's Conviction Is Required

"The right to counsel of choice is one of the constitutional rights most basic to a fair trial. Accordingly, it is clear that a criminal defendant need not demonstrate prejudice resulting from a violation of that right in order to have his conviction reversed." (*People v. Lara, supra*, 86 Cal.App.4th at 154.) The trial court violated appellant's constitutional rights when it refused to apply the counsel of choice standard to appellant's request and to permit appellant to discharge his retained counsel. Reversal of appellant's conviction is required.

ARGUMENT II

AS APPELLANT DEMONSTRATED AT THE MOTION FOR A NEW TRIAL, HE WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL. HIS MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED

A. Introduction:

On July 30, 2007, the jury found appellant guilty of all charges and allegations. (3 R.T. 642-645) On August 16, 2007, new counsel substituted in for appellant and on October 15, 2007, the court heard a Motion For New Trial based on ineffective assistance of counsel. (3 R.T.651, 659.) At a prior *Marsden* hearing, counsel did not mention doing any investigation or speaking with witnesses about the facts of the case. (1 R.T. 94-97.) The court denied the motion for new trial saying, he did not believe that the outcome would have been different had the additional defense witness testified. (3 R.T. 664.) The court indicated that the prosecution witnesses, "were quite believable," and agreed with the conclusion of the prosecutor, that the defense witness was, "not credible from the beginning." (3 R.T. 662, 664.)

The trial court was incorrect, the prosecution's witnesses were not so credible that their testimony was immune to question from another defense witness. Someone else corroborating Forever Merritt's testimony about how the shotgun, inconsistent the with gun described by either of the prosecution

witnesses, happened to be at appellant's residence a substantial time after the alleged crime would have bolstered Merritt's testimony.

The prosecution's witnesses were in the business of repossessing cars and had already, according to their own testimony, previously repossessed the same car from appellant. (2 R.T. 266-267, 272.) It was not surprising that they may have disliked appellant. Obviously, this time the repossession did not go smoothly for them, and one of them ended up walking into a tree. (2 R.T. 301-302, 304.) They had every incentive to exaggerate the details of the incident. To a large extent, their credibility as to a gun being involved in the incident at all depended on a gun being found at the residence, after a second search a substantial time after appellant had been arrested. Conveniently, despite the initial disparate descriptions of the gun, appellant was suppose to be brandishing, as soon as the shot gun was found they both positively identified it as the gun they had seen on the day of repossession.

Appellant's motion for new trial was based on a claim of ineffective assistance of trial counsel in violation of his his Sixth and Fourteenth Amendment rights. (2 S.C.T. 10.) In the motion, appellant provided a declaration from Monique Lewis, appellant's sister, who said that she would have testified that she took a gun over to the 5514 Budlong address, after the date of the alleged crimes. The gun Lewis said she took to the Budlong residence was the shotgun used as

evidence against appellant. (2 S.C.T. 10.) Lewis said she took the gun to store with Forever Merritt to keep it away from her own children. Lewis said she was never contacted by appellant's trial counsel. (2 S.C.T. 10.) The fact that no gun was recovered during the search of the residence the day of the alleged event, but a shotgun was recovered eighteen days later, was a suspicious hole in the prosecution's case.

Additionally, the motion had a declaration from defense witness Forever Merritt. (2 S.C.T. 12.) Merritt indicated that she and appellant's grandfather retained the trial counsel and explained to him that the shotgun seized from her residence on February 9, 2007, belonged to appellant's sister Lewis and was not used in any crimes on January 22, 2007. Merritt gave trial counsel contact information for Lewis and told him she was willing to testify. (2 S.C.T. 12.)

B. Applicable Law

A new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal. 3d 572, 582-583; *People v. Chavez* (1996) 44 Cal. App. 4th 1144, 1148.) To establish entitlement to relief for ineffective assistance of counsel, the burden is on the defendant to show (1) trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates; and (2) counsel's omissions deprived him of a potentially meritorious defense or, but for counsel's

deficient performance, it is reasonably probable that the outcome would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668 [104 S.Ct. 2052, 80 L.Ed.2d 674].) But for trial counsel's deficient performance in the instant case, it is reasonably probable that the outcome would have been more favorable for petitioner.

In the instant case, counsel failed to interview a key defense witness and failed to present testimony that would have supported the defense claim that the gun presented at trial was not a gun that could have been used in the alleged crimes, but rather, the gun was dropped off at the location days after the incident. The corroborating defense witness would have caused the jury to question the sudden appearance of the gun at the Budlong residence weeks after the incident and would have resulted in a more favorable outcome for appellant.

C. Trial Counsel Was Constitutionally Ineffective When He Failed to Contact, Interview and Call Monique Lewis as Witnesses at Trial

1. Trial counsel failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate

According to Monique Lewis, the shotgun seized in the search of the 5514 Budlong Avenue residence on February 9, 2007, was dropped of by Lewis on February, 4, 2007, thus the gun admitted at trial was not a gun used in commission of crimes on January 22, 2007. Monique Lewis was never contacted by appellant's trial counsel despite the fact that trial counsel had her contact

information and was informed she was willing to testify at trial if called as a witness. (2 S.C.T. 10, 12.)

It is well settled that, "investigation and preparation are the keys to effective representation," counsel has a duty to interview potential witnesses and "make an independent examination of the facts, circumstances, pleadings and laws involved." (*Von Moltke v. Giles* (1948) 332 U.S. 708, 721 [68 S.Ct. 316, 92 L.Ed.2d 309], *Strickland v. Washington, supra*, 466 U.S. at 691.) In the present case, trial counsel failed to contact Lewis and thus could not have made an intelligently reasoned decision as to whether she should testify or not in support of appellant's defense. Trial counsel introduced the issue as to where the gun came from, thus it was logical that he would have done follow up investigation to attempt to confirm and shore up his own witness's testimony. (3 R.T. 512-513, 525-526.) Here, failure to call a material witness necessary to appellant's defense fell below the acceptable level of a reasonably competent attorney.

2. Counsel's omissions deprived appellant of a potentially meritorious defense and, but for counsel's deficient performance, it is reasonably probable that the outcome would have been different

Many questions about the gun or guns allegedly used in the confrontation with the tow truck drivers remained after the prosecution rested its case. The fact that the gun recovered by the police weeks after the incident could not have been the gun used in the incident was at the heart of appellant's defense. The

prosecution witnesses were initially somewhat unclear about the gun they claimed to have seen. When the gun recovered from the house was showed to the witnesses, suddenly their memories became more clear. If Lewis had testified and described in detail when she dropped the gun off at the residence there may have been doubt as to the credibility of the prosecution witnesses.

Tow truck driver Lloyd Collins, a self described gun collector who recognizes guns, testified that on the day of the incident, appellant pointed a "long rifle" at him (2 R.T. 333.) After being presented with the Remington 870 shotgun recovered from the second search of the Budlong residence, Collins told the police that it was the same weapon appellant had pointed at him. (2 R.T. 331-332, 2 R.T. 439.) Certainly a gun collector would be expected to immediately recognize the difference between a shotgun and rifle. Prosecution witness Daywalt, who knew nothing about guns, only said the gun had a long barrel, a little longer than a foot. (2 R.T. 378, 379.) Daywalt saw the same gun pointed at Collins about 30 seconds after it was pointed at her and she pulled out and turned right. (2 R.T. 396-398.) After meeting with an investigator at the police station to identify the recovered shotgun, she, too, said that it was the gun from the incident. (2 R.T. 392.)

When defense witness Forever Merritt testified that the gun taken by the police from the Budlong residence was brought over by Monique Lewis to store

for safekeeping, her story lacked credibility without the corroboration of Lewis. (3 R.T. 512-513, 525-526.) The prosecution conducted a long query as to the context in which Merritt received the shotgun from Lewis (3 R.T. 523-527.63). The prosecution closed its cross-examination by highlighting the fact that Merritt and appellant were involved in a romantic relationship and she was testifying because she loves him. (3 R.T. 536-538.)

Defense counsel failed to present any evidence to support Merritt's claim, in effect, allowing the jury to disregard her testimony. Despite the fact that defense counsel could have presented a witness to bolster Merritt's testimony counsel failed to present any additional testimony. In fact, according to the declarations, counsel never even called Lewis to obtain her version of events regarding the shotgun despite the fact that he was well aware of the fact that she was willing to testify. (2 S.C.T. 10, 12.) Defense counsel's failure to even investigate evidence to support Merritt's testimony as appellant's lone witness deprived him of the ability to present a viable defense and constituted ineffective assistance of counsel.

Counsel's failure to call, Monique Lewis as a witnesses in petitioner's defense was unreasonable and violated petitioner's Sixth and Fourteenth Amendment right to the effective assistance of counsel. (*Von Moltke v. Gilles, supra,* 332 U.S. 708, 721; *Strickland v. Washington, supra,* 466 U.S. at 691.) Had

counsel called her, appellant's other defense witness would have had more credibility and appellant would have obtained a more favorable result at trial. With the testimony of Lewis, petitioner would have been acquitted of, at least, the offenses involving the use of a gun.

D. The Court Abused Its Discretion In Denying the Defense Motion For A New Trial Because The Ineffective Assistance Of Counsel Rendered Appellant's Trial Unfair in Violation of His Sixth Amendment Right to Counsel.

Since appellant was in fact prejudiced by his counsel's failures and there were grounds for a valid claim of ineffective effective assistance of counsel, the trial court abused its discretion by failing to grant appellant's motion for new trial. In assuming that the testimony of witness Lewis would also have been weak, like the defense witness at trial, rather than strong like the prosecution's tow truck driver witnesses, he substituted his own assessments for the judgement of a jury who never got to hear Lewis speak for herself.

At trial, the record indicates that the court made much of the fact that the attorney representing appellant in the motion for new trial was not the attorney during the trial, "Let me just say, you were not trial counsel. I don't know, in the court's mind, it wasn't much of an issue. It was a small issue, or I'd say an issue, but not a lingering question that your client had a firearm, a long firearm, and it was, if you will, identified in court and before the jury. So I'm not sure what effect calling this witness would have had on the outcome." (3 R.T. 661.) Whether or

not new counsel attended appellant's testimony should not have been a factor which was weighed against appellant in the evaluation of the validity of the ineffective assistance claim.

Contrary to the court's logic, if Lewis had been called to testify about her delivery of the shotgun after the incident, there likely *would* have been more question at trial about whether appellant had a firearm or not. With only the testimony of Merritt, apparently the court did not think the issue was in dispute, however, with a second witness testifying to her own recollections about the gun, there may have been more questions about the mysterious identification of the gun which was inconsistent with the gun described. At trial it was never explained why in fact the gun was never located in the search which occurred after the event, but turned up two weeks later, while appellant was in custody. (2 R.T. 431.) With the added testimony of Lewis, there would likely have been reasonable doubt as to whether the two truck drivers were telling the truth.

CONCLUSION

For the foregoing reasons, appellant's conviction should be reversed and he should be afforded a new trial with competent counsel.

Dated: April 2, 2008

Respectfully submitted,

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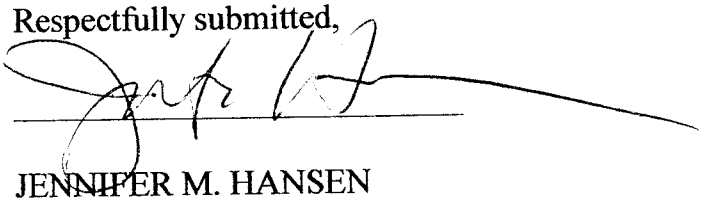
CERTIFICATE OF COMPLIANCE

The text of this brief consists of 7,473 words as counted by the Word Perfect version 10 word processing program used to generate this brief.

Dated: April 2, 2008

Respectfully submitted,



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